Supreme Court, U. S.
FILED
MAR 12 1979
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1396

LOUIS CHARBONNET, III, ET AL
Appellants

versus

HENRY BRADEN, IV, ET AL.,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

JURISDICTIONAL STATEMENT

GIBSON TUCKER, JR.
Second Floor
710 Carondelet Street
New Orleans, Louisiana

JERALD N. ANDRY &
GILBERT V. ANDRY, III
First Floor
710 Carondelet Street
New Orleans, Louisiana

Attorneys for Appellants

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Statutes Involved	3
Questions Presented	3
Statement of the Case	5
Questions Presented Are Substantial	13
Question of Racial Discriminatory Practices	15
Conclusion	16
Certificate of Service	17
Appendix A - Statutes Involved	A-1
Appendix B - Opinion of State District Court	A-15
Opinion of State Appellate Court	A-22
Order of Louisiana Supreme Court	A-36
Opinion and Order of Judge Mitchell recalling Temporary Restraining Order	A-37
Opinion and Order of Three-Judge Panel granting defendants' - appellees' Motion for Summary Judgment	A-48

INDEX TO CITATIONS

PAGE

Allen v. State Board of Elections, 393 U.S. 544 (1969) 3,13

Perkins v. Mathews, 400 U.S. 379 (1971) 3,14

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 3,13

United States v. Board of Commissioners of Sheffield, Alabama, et al., 98 S.Ct. 965 3

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THE OPINIONS BELOW

The decision of Judge Levy of the New Orleans Civil District Court is unreported. (Appendix B, infra, pp. A-20) The opinion of the Louisiana Court of Appeals for the Fourth Circuit is reported at 358 So.2d 360. (Appendix B, infra, pp. A-22). The order of the Louisiana Supreme Court denying the application for a Writ of Certiorari is not reported. (Appendix B, infra, p. A-36).

The decision of Judge Mitchell of the United States District Court for the Eastern District of Louisiana vacating his Temporary Restraining Order and dismissing plaintiffs' cause of action under 42 USC § 1983 is unreported. (Appendix B, infra, pp.A-37).

The decision of the three judge panel is unreported at

. (Appendix B, infra, pp. A-48).

JURISDICTION

This action was instituted in the United States District Court for the Eastern District of Louisiana on April 17, 1978. In their complaint, the plaintiffs-appellants sought a declaratory judgment on the legality of a State election where government officials changed the voting practices and procedures in contravention of Title 42 United States Code, Section 1973(c). Coupled with their prayer for a declaratory judgment seeking to hold this election null and void, the appellants also sought injunctive relief to prevent the apparent victor in the election, Henry Braden, IV, from being sworn in as State Senator from Louisiana's fourth Senatorial District. The plaintiffs-appellants subsequently amended their complaint by alleging causes of action under 42 USC § 1971 and under 42 USC §1983.

After initially granting a Temporary Restraining Order which prevented Braden from being sworn in, the District Court subsequently vacated the Temporary Restraining Order and also ruled adversely to plaintiffs' claim under 42 USC § 1983. Plaintiffs' appeal on the dismissal of this latter claim under the Civil Rights Act is still pending in the United States Court of Appeals for the Fifth Circuit.

On August 8, 1978, a three-judge panel heard oral argument on both parties' cross-motions for summary judgment on both causes of action (one under 42 USC § 1973(c) and the other, 42 USC § 1971). On December 7, 1978, the three-judge panel ruled adversely to both of appellants' causes of action. That judgment was entered on December

11, 1978.

Plaintiffs-appellants filed their Notice of Appeal to the United States Supreme Court in the United States District Court for the Eastern District on Jaunary 8, 1979.

Jurisdiction of this appeal is conferred on the United States Supreme Court by virtue of 42 USC § 1971(g); 42 USC §1973(c); and 28 USC § 2284.

Cases believed to support jurisdiction are: *Allen v. State Board of Elections,* Miss. and Virginia 1969, 393 U.S. 544. *Perkins v. Matthews,* Miss. 1971, 400 U.S. 379. *United States v. Board of Commissioners of Sheffield, Alabama, et al.*, 98 S.Ct. 965.

STATUTES INVOLVED

28 USC §2284	(See Appendix A, infra, pp. A-1)
42 USC § 1971	(See Appendix A, infra, pp. A-2)
42 USC § 1973(c)	(See Appendix A, infra, pp. A-10)
42 USC § 1983	(See Appendix A, infra, pp. A-12)
La. R.S. 18:533, 534 & 535	(See Appendix A, infra, pp. A-12)

QUESTIONS PRESENTED

Section 5 of the Voting Rights Act of 1965 provides that whenever a State or political subdivision with respect to which Section 4 of the Act is in effect (such as Louisiana)

shall enact any voting qualification or standard, practice, or procedure with respect to voting different from that in force on November 1, 1964, the change has no effect as law unless such State or subdivision obtains, as specified in the statute, a declaratory judgment that the change does not have a racially discriminatory purpose or effect. Alternatively, the change may be enforced if it is submitted to the Attorney General and he has interposed no objection to it within 60 days after the submission, or has advised that objection will not be made. Procedures have been established whereby the Department of Justice will accept requests for expedited approval of a change in the electoral process.

It was undisputed that the City of New Orleans fell within the coverage of Section 5. Despite the fact that the City should have obtained clearance from the Department of Justice before moving the voting poll in Ward 7, Precinct 6, the evidence revealed that the Department of Justice did not actually receive notice of the poll relocation until after the election. The U.S. Department of Justice never gave approval to this change and, in fact, after investigation of the poll relocation, that department interposed an objection to the move.

Nonetheless and despite the fact that plaintiffs' counsel have been in continuing contact with the Department of Justice, and the attorneys working this case, the Office of the United States Attorney General will do nothing.

The broad question presented by this appeal is whether the District Court erred in refusing to grant the plaintiffs-appellants any form of relief despite the clear violation of Section 5 of the Voting Rights Act; 42 USC §1973(c).

STATEMENT OF THE CASE

Before the questions presented by this appeal can be properly appreciated and before the frustration that this case has generated can be understood, the facts underlying this litigation should be explained.

At issue here is the right to the seat as State Senator for the Fourth Senatorial District of the State of Louisiana. An imperative consideration in the case is that the election in question was a special election, called to fill a vacancy for an unexpired term, so that the office in contest will itself expire on March 10, 1980; and the election for the successor will take place on December 8, 1979.

In the primary election held on March 4, 1978, the plaintiff, Louis Charbonnet, II I was the front runner by a comfortable margin. A run-off election was scheduled for April 1, 1978 between Louis Charbonnet, III and Henry Braden, IV. The election had unique significance in that both candidates were black and the winner would be Louisiana's only Negro State Senator. As the campaign in the run-off wore on, it became obvious (and the statistics later proved) that this Senatorial District presented a clear racial dichotomy with Braden receiving very strong support from the white community and Charbonnet receiving nearly as strong support from the black community.

The Fourth Senatorial District includes the Sixth Precinct of the Seventh Ward in New Orleans. This litigation turns on the voting (or lack thereof) in that precinct. Prior to the election on April 1, 1978, the voting in the Sixth Precinct had been conducted since 1969 at the residence of Mr.

Joseph Desivgnes at 1406 ½ LaHarpe Street. It is undisputed that even prior to its location at the Desvignes' residence the voting poll had always within memory been located within the confines of the precinct.

The core of this litigation lies in the negligent operating procedures employed by New Orleans election officials whenever voting poll locations are changed; their callous and cynical indifference to the effects such changes would necessarily have on the exercise of their franchise by the voters; and their complete disregard of the requirements of the Voting Rights Act. As the following summary reveals, this time the negligent officials not only showed a blatant disregard for the Voting Rights Act, but their actions or lack thereof, probably cost Louis Charbonnet, III the opportunity to be a State Senator and, concomitantly, deprived a substantial number of voters of their vote in amounts sufficient to deny the district of representation by the candidate of the majority's choice.

Mr. Desvignes had for some time been attempting to have the City move the polling place from his premises. He dated his efforts as having been prior to the recent mayoralty election (which had been held on November 1, 1977). Mr. Desvignes contacted officials at City Hall in an attempt to have the City move the voting poll. In the mayoralty election, because he felt he had contacted the officials too late for them to make a timely change, he allowed the City to use his home for the voting poll in Ward 7, Precinct 6 but he admonished the city officials that neither he nor his wife desired the poll to be located at his house from then on.

The City used his house in the Mayor's election and much

surprise, they also brought the voting machines to his house again for the March 4, 1978 primary election for Senator. He allowed his home to be used but he contacted Mr. James Pfister, an administratige assistant to the lame duck Mayor, shortly after the primary election and he insisted that the poll be moved before the run-off election to be held on April 1.

In order to comply with Mr. Desvignes' request, Mr. Pfister arranged to have the poll moved to a junior high school which was located approximately 10-12 blocks from the Desvignes' address. Pfister was not aware of the specific location of this school; he did not know that it was not located within the boundaries of Ward 7, Precinct 6 (it was in fact not even in a contiguous precinct but was in a precinct once removed from the Sixth Precinct); and, he was ignorant of the fact that state law prohibited voting polls from being located outside of the confines of the precinct they served.

Despite the fact that the arrangements to move this poll were completed prior to March 17, 1978, the first newspaper advertisement noting the change was not published until the day before the election. To make matters worse, the advertisement erroneously listed the new voting location as "Pines" Frederick School rather than its true name, "Rivers" Frederick School. This same advertisement was run in the morning paper on the day of the election.

The City officials failed to post any signs near the Desvignes' house directing voters to the new poll. To get to the new poll by public transportation required two separate bus rides and a two-three block walk through the intimidat-

ing surroundings. Desvignes did not find out that the voting machines would not be delivered to his house until he got home from work on the evening before the election. He himself made a sign on a 3" x 5" index card informing voters that there would be no voting at his house that Saturday and he posted this card on his garage door.

On the morning of the election all of the poll commissioners for Ward 7, Precinct 6 went to Mr. Desvignes' house to report for duty, never having received any information about the change. After several phone calls, the commissioners finally determined the new location of the poll. One of them fortunately had a car available at home, which he went back for and drove the commissioners to the new location and they opened the poll. Among the voting paraphernalia, there was no sign provided with which to display the new location of the poll in the school building. No one was left at the old location to direct the voters.

Charbonnet visited Mr. Desvignes' house about 9:00 a.m. on the morning of the election making rounds of the polling places. After learning for the first time that the poll had been moved, he notified his campaign headquarters and arranged to have a man operate a shuttle service to and from the two poll locations in an effort to minimize as much as possible the effects of the move on the outcome of the election.

Precinct 6 of Ward 7 was a very important precinct for Louis Charbonnet, III. Not only was Charbonnet a well-liked State Representative from that area but his family's mortuary business had been serving the needs of many of the people of this neighborhood since the turn of the century. In the primary election, Charbonnet had won 75% of the votes in this precinct in a race against several black candidates.

April 1, 1978 was a pretty spring day in New Orleans. Out of 60 precincts participating in the election 58 precincts had an *increased* voter turn-out over the primary election averaging 7%. One precinct had no change in voter turn-out. *The only precinct that reflected a decrease in voter turn-out was Ward 7, Precinct 6.* In fact, 34 less voters turned out, which constitutes a 6% decrease. Many of the voters who did vote in this precinct were transported to the poll by one Charbonnet campaign worker who used his own car from 10:00 a.m. to 8:00 p.m. to help transport any voter who wanted to vote that day.

Louis Charbonnet, III lost the election to Henry Braden, *by only 14 votes* out of more than 15,000 votes cast. Charbonnet won 80% of the votes in Ward 7, Precinct 6 in the run-off election. It does not take a statistician to realize that had there been the same increase in voter turn out in this precinct, as there was district-wide, (and assuming that Charbonnet was favored by the same 75-80% of the additional votes, as he did of the votes cast) Charbonnet would have been the new State Senator from that district.[1]

Charbonnet promptly contested the election in the state court. Suit was timely instituted on Thursday, April 6, 1978, and proceeded to trial on depositions beginning Saturday, and continued on a daily basis through Monday, April

1. Detailed statistics on the April 1 election have been compiled and can be supplied to the Court.

17. As of that date Charbonnet had won a new election in the Sixth Precinct in the district court; been reversed on Braden's appeal to the Court of Appeal; and been refused supervistory writs from the Louisiana Supreme Court, and had thus exhausted all prospects of relief in the state system.

The district court had ruled that the election in the Sixth Precinct was patently illegal, because the poll had been removed from the precinct in violation of the positive provisions of the newly enacted election code, LSA R.S. 18:531, 532 and 533(B).

The Court of Appeal reversed. Charbonnet had produced registered voters, who did not vote, in sufficient quantity to have changed the election result, who testified that they had gone to the polls to vote for Charbonnet, but because they found the poll had been moved had not been able to vote. The consensus of the Court of Appeal seemed to be that the voters had not shown sufficient determination in pursuit of their right to vote, and so refused to upset the election. On Monday, at 10:00 a.m., counsel received word from the Louisiana Supreme Court that writs had been denied. Within the hour this suit under the Voting Rights Act 42 USC §1973 was filed in the United States District Court for the Eastern District of Louisiana. In order to prevent Braden from being sworn in to a position that he was not legally elected to occupy, counsel obtained a Temporary Restraining Order at 11:03 a.m. that same morning, restraining Braden's investiture.

Charbonnet was joined in the suit by a representative group of the electors in the Sixth Precinct who had been thwarted in the exercise of their franchise by the displacement of the poll.

Later that day, Judge Mitchell ordered a hearing in the matter so he could determine whether he should vacate his Temporary Restraining Order. The hearing concluded and both sides submitted memoranda in support of their positions.

On the following day, plaintiffs-appellants amended their complaint to include a cause of action under 42 USC § 1983. Plaintiffs subsequently amended the complaint again to include another cause of action under 42 USC § 1971 and to request the Court to award attorneys fees.

On April 19th, Judge Mitchell annulled and vacated his Temporary Restraining Order and in the same order, dismissed plaintiffs' cause of action under 42 USC § 1983 because there had been no showing of intentional discrimination on the part of any official acting under color of state law.

On April 20th, Judge Mitchell denied plaintiffs' request for a preliminary injunction pending the appeal of his order dissolving the Temporary Restraining Order. The Court of Appeals for the Fifth Circuit also denied without a hearing, plaintiffs' request for injunctive relief pending the outcome of the appeal. Counsel subsequently filed a motion for in-chambers consideration by Mr. Justice Powell to grant a stay of the order of the district court recalling the Temporary Restraining Order which was denied.

The first pre-trial conference on the Voting Rights Act litigation was held on April 27, 1978. A three-judge panel

had been convened, but Judge Mitchell alone presided at the conference. Since the bulk of the evidence pertinent to this federal litigation had already been discovered in the state trial process, counsel were ordered to summarize the trial testimony and deposition testimony of all relevant witnesses. Further depositions of witnesses who were unavilable or unknown at the time of the state trial were subsequently taken. All of the testimony was summarized and submitted to the Court but no trial or hearing date was established. Judge Mitchell was dispatched to the Panama Canal Zone where he attended to the judicial functions of that Court. Meanwhile Henry Braden was serving as State Senator, and Louis Charbonnet was being accused of being a sore loser for challenging the election results. And meanwhile the disenfranchised voters remained remediless. Counsel for appellants on May 24th filed a motion for priority assignment of this case for trial pursuant to 42 USC § 1973 and 28 USC § 2284.

It had been agreed that the testimony at the state trial would be submitted as the testimony in the instant proceeding. Both parties had moved for summary judgment. But the case was not heard until August 8, 1978. Four months later, the three-judge panel rendered their decision granting the defendants'-appellees' motion for summary judgment. In essence, the district court held that (1) the relocation of the voting poll in Ward 7, Precinct 6 was not discriminatory in practice or in effect and, therefore, not violative of 42 USC § 1971, and (2) the "technical violation" of 42 USC §1973 (c) did not entitle these private litigants to any form of relief.

The comparison of the two proceedings at this point is inescapable. Charbonnet, contending that the election was illegal under the state law was able to litigate his case through

the entire state system between April 6, 1978 and April 17, 1978, eleven days. But when the disenfranchised voters came to federal court for the protection of their federally guaranteed right to vote, it took them six months to be told they were not entitled to any protection, so that they could appeal. Unless this court can give the matter extraordinary treatment the purpose of the Congress in the enactment of the Voting Rights Act will continue to be thwarted and the casual indifference of local state authorities to the congressional mandate will go on, unremarked and remedied.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

Congress adopted the Voting Rights Act in 1965 to implement the Fifteenth Amendment and erase the blight of racial discrimination in voting. The core of the Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been the most flagrant. See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Congress resorted to these stern measures because experience had shown them to be necessary to eradicate the insidious and pervasive evil of racial discrimination in voting that had been perpetrated in certain parts of the country. Earlier efforts to end this discrimination by facilitating case-by-case litigation had proved ineffective in large part because voting suits had been unusually onerous to prepare and exceedingly slow to produce results.

In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), this Court examined the objectives of the Act and its legislative history. That analysis led to this Court's interpretation that Section 5 was to be given "the broadest possible scope", id, at 567, and to require prior federal scrutiny of

any state enactment which altered the election law in a covered state in even a minor way. This Court has specifically required federal preclearance of laws changing the location of a polling place. See *Perkins v. Mathews*, 400 U.S. 379 (1971).

The District Court was confronted with the fact that the relocation of the voting poll in Ward 7, Precinct 6 was the only understandable reason why this was the only precinct out of 60 precincts that reflected any decrease in voter participation. The court recognized the fact that the city totally failed to comply with the mandatory preclearance requirements established by Section 5 of the Act. However, the court erroneously focused its attention on the private litigants' failure to prove any intentional racial discrimination. The court's interpretation of Section 5 thus places the advantages of time and inertia back on the political subdivision that violated the Act. The only recourse for the minority group members affected by such changes would be the one Congress implicitly found to be unsatisfactory: repeated litigation. The clear consequence of this interpretation would be to nullify both Section 5 and the Act in a number of its potential applications.

The district court acted unjustifiably in waiting over five months to reach a decision in this case. The court then utilized this delay by holding that a technical violation of Section 5 did not warrant the drastic relief of ordering a new election. Had the decision been reached promptly, this form of relief would not have been upsetting to the community. Counsel for appellants acted in every conceivable way to bring this suit to a quick and final conclusion. Instead, the court dissolved the temporary restraining order which prevented Braden from being sworn in as Senator and allowed this man to represent the interests of all of the citizens of this district despite the fact that the election was plainly conducted in violation of specific federal voting laws and despite the fact that in all probability, had this poll not been relocated, Braden would not have been elected Senator.

THE QUESTION OF RACIAL DISCRIMINATORY PRACTICES

This court could not have made it more clear that racial motivations vel non play no part in cases where local authorities violate the requirements of Sec. 1973(c). And it is wisely so. In the instant case, were it otherwise, plaintiffs would have the impossible burden of proving Mr. Pfister's motivation to have been racially oriented. They do not have to prove this. They admit that they cannot. But despite the fact that they do not have to prove it, apparently they lose because they admit that they cannot prove it.

When the voters, represented by the class plaintiffs, presented themselves at the old polling place to vote, they were presented with an admittedly illegal change in the voting practices and procedure which had theretofore prevailed in their precinct. The poll had been moved. In order to vote they *had to comply with this change*. They did not comply with the change by going to the new location to vote - and they were thus disenfranchised. The Act contains this positive prohibition in §1973(c):

> "Until the court enters such a judgment no person shall be denied the right to vote for failure to comply with such ... practice or procedure..."

Regardless of Pfister's purpose, or lack of it, it is a fact and the record shows that the moved polling place discriminated against the black voters of the district. The Sixth Precinct is shown to be 92% black. Other precincts are as much as 100% white. But it was in this black precinct that this precipitated and unannounced change occurred. It is alleged and it is not disputed that Braden was the overwhelming favorite of the whites, while Charbonnet drew his support almost entirely from the black precincts.

The City illegally moved this black precinct and the blacks' candidate lost by 14 votes. The whites' candidate now represents this district.

Though it is not even necessary to prove it, the unquestioned facts are the illegal move had a racially discriminatory effect.

CONCLUSION

The questions presented by this appeal are substantial and of broad public importance. Should the district court's decision be followed in the future, new difficulties will be encountered in the enforcement of Section 5 of the Voting Rights Act. The objectives behind the Act will have been violated and private litigants will be forced to bear not only the burdensome effort and costs of litigation but they will be forced to prove that officials of a political subdivision intentionally discriminated against voters.

For these reasons, probable jurisdiction should be noted and the case set down for an early hearing.

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Jurisdictional Statement have been served on George Lamarca, 533 St. Charles Ave., New Orleans, La., 70130; Steven Murray, 612 Gravier Street, New Orleans, La.,; Ronald Nabonne, 418 Common Street, New Orleans, La.; Glen Burns, 612 Gravier Street, New Orleans, La.; Bruce J. McConduit, 1821 Orleans Avenue, Suite 216, New Orleans, La.; John A. Shea, 822 Perdido Street, Room 402, New Orleans, La. and Donald Ensenat, 234 Loyola Building, New Orleans, La., this 9th day of March,1979.

GILBERT V. ANDRY, III

JERALD N. ANDRY

GIBSON TUCKER, JR.

§ 2284. Three-judge district court; composition; procedure

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. June 25, 1948, c. 646, 62 Stat. 968; June 11, 1960, Pub.L. 86-507, § 1(19), 74 Stat. 201.

SUBCHAPTER I.—GENERALLY

§ 1971. Voting rights—Race, color, or previous condition not to affect right to vote; uniform standards for voting qualification; errors or omissions from papers; literacy tests; agreements between Attorney General and State or local authorities; definitions

(a)(1) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

(2) No person acting under color of law shall—

(A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote;

(B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election; or

(C) employ any literacy test as a qualification for voting in any election unless (i) such test is administered to each individual and is conducted wholly in writing, and (ii) a certified copy of the test and of the answers given by the individual is furnished to him within twenty-five days of the submission of his request made within the period of time during which records and papers are required to be retained and preserved pursuant to sections 1974 to 1974e of this title: *Provided, however,* That the Attorney General may enter into agreements with appropriate State or local authorities that preparation, conduct, and maintenance of such tests in accordance with the provisions of applicable State or local law, including such special provisions as are necessary in the preparation, conduct, and maintenance of such tests for persons who are blind or otherwise physically handicapped, meet the purposes of this subparagraph and constitute compliance therewith.

(3) For purposes of this subsection—

(A) the term "vote" shall have the same meaning as in subsection (e) of this section;

(B) the phrase "literacy test" includes any test of the ability to read, write, understand, or interpret any matter.

Intimidation, threats, or coercion

(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector,

Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

Preventive relief; injunction; rebuttable literacy presumption; liability of United States for costs; State as party defendant

(c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. If in any such proceeding literacy is a relevant fact there shall be a rebuttable presumption that any person who has not been adjudged an incompetent and who has completed the sixth grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico where instruction is carried on predominantly in the English language, possesses sufficient literacy, comprehension, and intelligence to vote in any election. In any proceeding hereunder the United States shall be liable for costs the same as a private person. Whenever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a) of this section, the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State.

Jurisdiction; exhaustion of other remedies

(d) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.

Order qualifying person to vote; application; hearing; voting referees; transmittal of report and order; certificate of qualification; definitions

(e) In any proceeding instituted pursuant to subsection (c) of this section in the event the court finds that any person has been deprived on account of race or color of any right or privilege secured by subsection (a) of this section, the court shall upon request of the Attorney General and after each party has been given notice and the opportunity to be heard make a finding whether such deprivation was or is pursuant to a pattern or practice. If the court finds such pattern or practice, any person of such race or color resident within the affected area shall, for one year and thereafter until the court subsequently finds that such pattern or practice has ceased, be entitled, upon his application therefor, to an order declaring him qualified to vote, upon proof that at any election or elections (1) he is qualified under State law to vote, and (2) he has since such finding by the court been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. Such order shall be effective as to any election held within the longest period for which such applicant could have been registered or otherwise qualified under State law at which the applicant's qualifications would under State law entitle him to vote.

Notwithstanding any inconsistent provision of State law or the action of any State officer or court, an applicant so declared qualified to vote shall be permitted to vote in any such election. The Attorney General shall cause to be transmitted certified copies of such order to the appropriate election officers. The refusal by any such officer with notice of such order to permit any person so declared qualified to vote to vote at an appropriate election shall constitute contempt of court.

An application for an order pursuant to this subsection shall be heard within ten days, and the execution of any order disposing of such application shall not be stayed if the effect of such stay would be to delay the effectiveness of the order beyond the date of any election at which the applicant would otherwise be enabled to vote.

The court may appoint one or more persons who are qualified voters in the judicial district, to be known as voting referees, who shall subscribe to the oath of office required by Revised Statutes, section 1757; to serve for such period as the court shall determine, to receive such applications and to take evidence and report to the court findings as to whether or not at any election or elections (1) any such applicant is qualified under State law to vote, and (2) he has since the finding by the court heretofore specified been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. In a proceeding before a voting referee, the applicant shall be heard ex parte at such times and places as the court shall direct. His statement under oath shall be prima facie evidence as to his age, residence, and his prior efforts to register or otherwise qualify to vote. Where proof of literacy or an understanding of other subjects is required by valid provisions of State law, the answer of the applicant, if written, shall be included in such report to the court; if oral, it shall be taken down stenographically and a transcription included in such report to the court.

Upon receipt of such report, the court shall cause the Attorney General to transmit a copy thereof to the State attorney general and to each party to such proceeding together with an order to show cause within ten days, or such shorter time as the court may fix, why an order of the court should not be entered in accordance with such report. Upon the expiration of such period, such order shall be entered unless prior to that time there has been filed with the court and served upon all parties a statement of exceptions to such report. Exceptions as to matters of fact shall be considered only if supported by a duly verified copy of a public record or by affidavit of persons having personal knowledge of such facts or by statements or matters contained in such report; those relating to matters of law shall be supported by an appropriate memorandum of law. The issues of fact and law raised by such exceptions shall be determined by the court or, if the due and speedy administration of justice requires, they may be referred to the voting referee to determine in accordance with procedures prescribed by the court. A

hearing as to an issue of fact shall be held only in the event that the proof in support of the exception disclose the existence of a genuine issue of material fact. The applicant's literacy and understanding of other subjects shall be determined solely on the basis of answers included in the report of the voting referee.

The court, or at its direction the voting referee, shall issue to each applicant so declared qualified a certificate identifying the holder thereof as a person so qualified.

Any voting referee appointed by the court pursuant to this subsection shall to the extent not inconsistent herewith have all the powers conferred upon a master by rule 53(c) of the Federal Rules of Civil Procedure. The compensation to be allowed to any persons appointed by the court pursuant to this subsection shall be fixed by the court and shall be payable by the United States.

Applications pursuant to this subsection shall be determined expeditiously. In the case of any application filed twenty or more days prior to an election which is undetermined by the time of such election, the court shall issue an order authorizing the applicant to vote provisionally: *Provided, however*, That such applicant shall be qualified to vote under State law. In the case of an application filed within twenty days prior to an election, the court, in its discretion, may make such an order. In either case the order shall make appropriate provision for the impounding of the applicant's ballot pending determination of the application. The court may take any other action, and may authorize such referee or such other person as it may designate to take any other action, appropriate or necessary to carry out the provisions of this subsection and to enforce its decrees. This subsection shall in no way be construed as a limitation upon the existing powers of the court.

When used in the subsection, the word "vote" includes all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election; the words "affected area" shall mean any subdivision of the State in which the laws of the State relating to voting are or have been to any extent administered by a person found in the proceeding to have violated subsection (a) of this section; and the words "qualified under State law" shall mean qualified according to the laws, customs, or usages of the State, and shall not, in any

event, imply qualifications more stringent than those used by the persons found in the proceeding to have violated subsection (a) of this section in qualifying persons other than those of the race or color against which the pattern or practice of discrimination was found to exist.

Contempt; assignment of counsel; witnesses

(f) Any person cited for an alleged contempt under this Act shall be allowed to make his full defense by counsel learned in the law; and the court before which he is cited or tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, who shall have free access to him at all reasonable hours. He shall be allowed, in his defense to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial or hearing, as is usually granted to compel witnesses to appear on behalf of the prosecution. If such person shall be found by the court to be financially unable to provide for such counsel, it shall be the duty of the court to provide such counsel.

Three-judge district court; hearing, determination, expedition of action, review by Supreme Court; single-judge district court; hearing, determination, expedition of action

(g) In any proceeding instituted by the United States in any district court of the United States under this section in which the Attorney General requests a finding of a pattern or practice of discrimination pursuant to subsection (e) of this section the Attorney General, at the time he files the complaint, or any defendant in the proceeding, within twenty days after service upon him of the complaint, may file with the clerk of such court a request that a court of three judges be convened to hear and determine the entire case. A copy of the request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of the copy of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In any proceeding brought under subsection (c) of this section to enforce subsection (b) of this section, or in the event neither the Attorney General nor any defendant files a request for a three-judge court in any proceeding authorized by this subsection, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or, in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

R.S. § 2004; Pub.L. 85–315, Pt. IV, § 131, Sept. 9, 1957, 71 Stat. 637; Pub.L. 86–449, Title VI, § 601, May 6, 1960, 74 Stat. 90; Pub.L. 88–352, Title I, § 101, July 2, 1964, 78 Stat. 241; Pub.L. 89–110, § 15, Aug. 6, 1965, 79 Stat. 445.

§ 1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court, appeal to Supreme Court.

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory ment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title and unless and until the

court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval . within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

As amended Pub.L. 94-73, Title II, § § 204, 206, Title IV, § 405, Aug. 6, 1975, 89 Stat. 402, 404.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. § 1979.

§ 533. Establishment and locatioin of polling places

A. Establishment. The governing authority of each parish shall establish one polling place for each precinct.

B. Location. The polling place for a precinct shall be located in the precinct at a suitable public building, or, if none is available, then on private property.

C. Prohibited locations. A polling place shall not be located in or on the grounds of:

(1) A place where beverages of high or low alcoholic content are dispensed to the public, but this prohibition shall not prevent the location of a polling place on premises housing a nonprofit organization whose principal business is not the dispensing of beverages of high or low alcoholic content, but no such alcoholic beverages shall be dispensed on such premises during election day or for three hours before the polls open.

(2) A jail, penitentiary, or other penal institution.

(3) A mental hospital or a mental health center.

(4) An eleemosynary institution where wards of the state are confined or housed at state expense, except educational institutions and the United States Marine Hospital No. 88 at Carville.

(5) Private property owned, occupied, or leased by a candidate in the election or the spouse of any such candidate, or an officer or employee of the state or any of its political subdivisions.

D. Payment for use of private property. When it is necessary to pay for the use of private property as a polling place, the payment shall not exceed fifty dollars for each election.

Acts 1976, No. 697, § 1, eff. Jan. 1, 1978.

Cross References

School property used for elections, liability insurance, see R.S. 17:87.7.

§ 534. Change of precincts and polling places

Once a precinct or a polling place is established, it may only be changed by a vote of the parish governing authority. A precinct shall not be changed less than three months before a primary or general election. The location of a polling place shall not be changed less than three months before a

primary or general election unless the polling place becomes unavailable because of an emergency or the refusal of the owner of private property to allow the premises to be used as a polling place.

Acts 1976, No. 697, 1, eff. Jan. 1, 1978.

§ 535. Notice of location of precincts and polling places

A. Establishment and change. When a precinct or polling place is established or changed, notice of its location shall be published by the parish governing authority. The publication shall be in the official journal of the parish.

B. Before primary elections. The parish board of election supervisors shall publish the location of the polling places in the parish at least three times before each primary election. The first publication shall be during the eighth week before the primary election; the second publication shall be during the fifth week before the primary election, and the third publication shall be during the second week before the primary election. The publications shall be in the official journal of the parish.

Acts 1976, No. 697, § 1, eff. Jan. 1, 1978.

APPENDIX B

OPINION OF STATE DISTRICT COURT

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

LOUIS CHARBONNET, III — NO 78-5079

vs — DIVISION "D"

HENRY E. BRADEN, IV — DOCKET: 5

REASONS FOR JUDGMENT

Mr. Louis Charbonnet, III, plaintiff in these proceedings, seeks to have the election of April 1, 1978, declared a nullity and to have and to have the Court order another election to declare who should be the proper representative of the people, as senator from the district from which they ran on April 1, 1978.

The thrust of Mr. Charbonnet's contention that a new election should be called is:

1. That the registered voters of Precinct Six of Ward Seven were not given the oportunity to freely vote their choice, for the reason that the polling place had been moved from a location within Precinct Six of Ward Seven into another Precinct, i.e., Precinct Seven of Ward Seven. He further contends that the change of location was not actually made until the day before, or the morning of, April 1,

1978.

Section 18:533 of the Louisiana Revised Statutes forming part of the so called "Election Code" specifically states that:

> "A. The governing authority of each parish shall establish one polling place for *each precinct.*
>
> "B. The polling pace for a precinct *shall be located in the precinct****"

The Court finds as a fact that the polling place of Precinct Six of Ward Seven, for the election of April 1, 1978, was not located "in the precinct" (i.e., Precinct Six). In other words, the boundary of Precinct Six of Ward Seven did not include 1932 Touro Street, the location of the polling place for registered voters of the Sixth Precinct of Ward Seven voting on April 1, 1978.

Evidence, in the form of a number of depositions, was sought to be introduced to show that many registered voters of Precinct Six of Ward Seven had been unable to find the new polling place; and that many of them did not vote for other reasons connected with the removal of the polling place. Plaintiff further sought to show for whom these particular witnesses would have voted, had they been able to find the new polling place. The Court is of the opinion that most (if not all) of this evidence is irrelevant to the main issue. Simply stated, the provisions of L.S.A. 18-533 have been violated by those whose duty it was to follow the law and to place the voting machines in precincts in which the voters were registered, resulting in a deprivation of the right

to vote in the precinct in which the voter is registered. Testimony has been offered to show that there are other precincts within the area where residents are permitted to vote in polling places in precincts in which they are not registered voters. However, no one in these proceedings has contested the results of those particular precincts, nor does the fact that there are other violations of the law relieve the legal obligations as clearly set forth in 18:533(B), to have the polling place located within the boundary of the precinct in which the voters reside, and in which he is a registered voter. Furthermore, it is not contended that in the other precincts the polling places were moved a day before the election, or that the provisions of the law requiring ample notice of the moving of the polling places has not been complied with. Had all of the registered voters in Precinct Six of Ward Seven voted on April 1, 1978, in the voting area in which the voting machines were located, i.e., the Seventh Precinct of Ward Seven, the results of the election could not have been contested. It may be that a sufficient number of registered voters in the other precincts where the voting machines are illegally placed (in the precincts other than that in which the voters are registered) satisfies plaintiff, inasmuch as he did not contest the results of these particular precincts.

The Court is therefore satisfied, and it is its opinion that the votes cast in Precinct Six of Ward Seven should not be counted.

2. Plaintiff's second contention is that because the "public counter" in the voting machines in thirty-four precincts show a total of sixty more votes cast than the combined vote cast for both candidates as shown by the voting machine, the Court should hold that another election

should be held, at least in those particular thirty-four precincts.

It is interesting to note that neither plaintiff nor defendant sought to check the signed registration polling books in the respective precincts. Had this been done, it would have been a simple matter to determine whether or not the total vote cast for both candidates was the correct count, or whether the "public counter" properly registered the number of voters who entered the voting machines.

From the demonstration of the operation of a voting machine of the type used in the April 1st, 1978, election, brought into the Courtroom, together with the testimony of experts, it is apparent that it is possible for a vote to be registered on the public counter without being registered as a vote for either candidate. This would not be a malfunction of the machine, but rather a human error by the voter. Inasmuch as there is an explanation as to how these small discrepancies can occur, the doctrine of res ipsa (even if contended or pleaded) cannot be said to apply. Hence, in the Court's opinion, there is no reason to believe that in another election, called to re-open the voting in the thirty-four precincts a different result would be reached insofar as the difference between the total votes cast for the two candidates and the total shown on the "public counter." Actually, the difference is minimal in each of the thirty-four precincts.

The evidence produced, in the Court's opinion, clearly shows that the discrepancies such as occurred in the thirty-four precincts have constantly occurred in past elections, and again, while "two wrongs do not make a right," there is no possible showing that the errors were not human errors,

rather than machine malfunctions.

Having so found the above stated facts, the question is whether or not, because of the misplacement of the polling place of Precinct Six of Ward Seven, the entire election should be declared a nullity or whether that precinct vote should merely be disregarded; or whether there should be another election held for the sole purpose of permitting the registered voters of Precinct Six of Ward Seven to cast a vote for whichever candidate they choose so to do.

The "Election Code" seems to be silent on furnishing any guideline for such a situation as exists in this case.

The Court is of the opinion that in the interest of justice, and to afford the voters registered in Precinct Six of Ward Seven a chance to vote in the Precinct in which they are registered, another election should be held only in the Sixth Precinct of Ward Seven with the voting machines being placed within the Sixth Precinct of Ward Seven. The results of that election should be added to the total vote of each candidate in the remaining precincts of the area covered by the Senatorial District.

There will be Judgment accordingly.

New Orleans, Louisiana,
on this 11th day of
April, 1978.

s/ S. Sanford Levy
JUDGE

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

LOUIS CHARBONNET, III — NO. 78-5079

vs — DIVISION "D"

HENRY E. BRADEN, IV — DOCKET :5

JUDGMENT

The above entitled and numbered cause came on for trial on the 10th day of April, 1978, and was concluded on the 11th day of April, 1978, at which time the Court took the matter under advisement.

PRESENT: GIBSON TUCKER, JR., Esq., attorney for plaintiff.

STEPHEN B. MURRAY, Esq., attorney for defendant,

WHEN, After hearing the pleadings, the evidence and the argument of counsel, the Court, after taking the matter under advisement for further consideration and adjudication, after considering the law and the testimony and other evidence adduced, for the written reasons this day given:

IT IS ORDERED, ADJUDGED AND DECREED That

another election be held only in the Sixth Precinct of Ward Seven of the City of New Orleans, the said election to be called by the proper authorities within as short a period of time as the law permits.

That the polling place for such election be located within the geographical boundary of Precinct Six of Ward Seven, and the authority responsible for locating such polling place give notice to the registered voters of that precinct of the location of such polling place and the date of such election.

That the results of such election be added to the already tabulated votes cast for the two candidates to determine the voters' choice for a Senator to represent the said District.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That the Exceptions heretofore referred to the merits are hereby overruled.

JUDGMENT RENDERED AND SIGNED in Open Court on this 11th day of April, 1978 at 11 o'clock a.m.

s/ S Sanford Levy
JUDGE

OPINION OF STATE APPELLATE COURT

LOUIS CHARBONNET, III NO. 9522

VS. COURT OF APPEAL

HENRY E. BRADEN, IV FOURTH CIRCUIT

STATE OF LOUISIANA

APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, NO. 78-5079, HONORABLE S. SANFORD LEVY, JUDGE

JOHN C. BOUTALL
JUDGE

(Court composed of Judges L. Julian Samuel, William V. Redmann, Harry T. Lemmon, Edward J. Stoulig, John C. Boutall, Patrick M. Schott, Peter H. Beer, Marcel Garsaud, Jr., and Julian E. Bailes)

J.J. LEMMON, GARSAUD, BAILES, CONCURRING.

TUCKER, SCHONEKAS & GARRISON
(Gibson Tucker, Jr.)
ANDRY & ANDRY
(Gilbert V. Andry, III)
Attorneys for Plaintiff-Appellee

MURRAY, MURRAY, ELLIS, BRADEN & LANDRY
(Stephen B. Murray)
DOUGLAS, NABONNE & WILKERSON
(Ronald P. Nabonne)
Attorneys for Defendant-Appellant

DONALD ENSENAT, Assistant Attorney General
For State of Louisiana

AFFIRMED IN PART
REVERSED IN PART.

Candidate Louis Charbonnet, III contests the election of Henry E. Braden, IV to the office of Senator, Fourth State Senatorial District of Louisiana. The respondent filed exceptions of prescription and peremption which were overruled. On the merits the trial court ruled in favor of Charbonnet, and braden appealed. The election and the resulting contest are within the provisions of Louisiana's new Election code, effective January 1, 1978, Act 697 of 1976 as amended, now Revised Statutes, Title 18.

EXCEPTION OF PRESCRIPTION

R.S. 18:1406 A provides:

"An action objecting to candidacy or contesting an election shall be instituted by filing a petition in a competent court and posting a copy of the petition in a conspicuous place at the entrance of the office of the clerk of court where the petition is filed. The petition shall set forth in detail the grounds for the objection or contest."

Defendant contends that this action was not timely, because although the petition was filed within five days after the date of the election, a copy of the petition was not posted in a conspicuous place at the entrance of the office of

the clerk of court until the sixth day after the election.[1]

The Election Code does not allocate the responsibility for completing the mandated procedures, once the judicial machinery is put into action by the filing of a petition. Defendant's exception is based on the premise that the posting of the petition at the entrance of the clerk's office is a burden placed on the plaintiff in an election suit in order to toll the running of the peremptive period of R.S. 18:1405 B.

The statute requiring the posting cannot be reasonably interpreted to impose this burden on the plaintiff. The handling of petitions after timely filing is a function traditionally assigned to the clerk of court, and we perceive no intent of the Election Code to change this function, nor do we perceive any purpose for doing so.

We hold that a plaintiff in an election suit interrupts any period of prescription or peremption by filing a petition in a competent court, and any mandatory provisions thereafter relating to the handling of the petition do not affect the question of timely filing.

ON THE MERITS

In his petition plaintiff Charbonnet raises two bases on which he seeks to declare the election void: 1.) the polling

1. R.S. 18:1405 B provides:

"An action contesting any election involving election to office shall be instituted within five days after the date of the election and no such contest shall be declared moot because of the performance or nonperformance of a ministerial function, including but not limited to matters relating to the printing of ballots for the general election."

place in Ward 7, Precinct 6 was moved just prior to the election from its location in the primary to a new location in a school within the geographical boundaries of another precinct, some ten or twelve blocks away; 2.) the tabulations on 34 voting machines show a total of sixty fewer votes counted for the candidates than the total amount of people voting.[1] Since the difference between the candidates was a total of 14 votes it is argued that the 60 votes are sufficient to have changed the course of the election. Plaintiff further pleaded a constitutional question which is not at issue herein.

The trial court found that the difference in the count of the votes was not due to malfunctioning of the voting machines, but was caused by errors of the voter in casting a ballot, that the amount of such votes were minimal, and that there was no reason to believe that re-voting in a new election would cause a different result. He resolves this issue in favor of defendant. However, on the issue of the location of the polling place, the court found as a fact that the polling place of Ward 7, Precinct 6, was not located within the precinct boundaries, stating:

> "Simply stated, the provisions of L.S.A. 18-533 have been violated by those whose duty it was to follow the law and to place the voting machines in precincts in which the voters were registered, resulting in a deprivation of the right to vote in the precinct in which the voter is registered."

The court noted there was proof of other precincts with polling places located outside the precinct boundaries, but

Footnote 1.) Braden received 7593 votes and Charbonnet 7578. In Ward 7, Pct. 6, the totals were Braden 41, Charbonnet 202, machine counter 245.

those were not put at issue by the parties. Accordingly he rendered judgment solely on the basis of the illegal polling place of Ward 7, Precinct 6. His judgment did not void the election, but he ordered that another election, with adequate notice, be held only in Ward 7, Precinct 6 at a poll within the Precinct boundaries, the results of that election to be added to the already tabulated votes of the candidates to determine the winner.

At the outset we must say that the new election code of Louisiana contains provisions regulating the court's determination of election contests. R.S. 18:1431 through 1434. Generally speaking, this enactment by the legislature provides us with the guidelines governing our inquiry into the case, and the result to be reached upon a final determination by the court. We note that the result ordered by the trial court is not among the remedies afforded. The parties both argue that Section 1431, concerning fraudulent or illegal votes is not applicable, and indeed there is no issue of fraud whatsoever raised in this case. The issues presented come under the provisions of Section 1432 which provides only for a declaration that the entire election be voided.

It is apparent that the plaintiff in this suit is required to prove either that 1.) it is impossible to determine the result of the election, or 2.) the number of qualified voters who were denied the right to vote by the election officials was sufficient to change the result in the election, if they had been allowed to vote. We conclude that his proof is insufficient in either case.

It is conceded that the polling place in question was outside the precinct boundaries in violation of R.S. 18: §533.B.

But what is the effect on the results of this election? Neither of the parties had anything to do with its change or location, which is solely within the responsibility of the governing authority. § 533A. As we consider the evidence, the main problem that arose here is the lateness of the change for one location to another. § 534 and § 533 regulate the change of polling places and require publication. Some two weeks before the election the change was made but no publication appeared until the afternoon before the election, when the Board of Election Supervisors published an official list of polling places in its official journal, The New Orleans-States Item. The only other notice was a list published by the Times Picayune newspaper as a news item on the morning of the election.

Under these circumstances, we do not consider that the votes cast in that precinct should be disregarded and not counted because cast at an illegal voting place. See § 531A. We quote from the case of Johnson v. Sewerage District #2 of Parish of Caddo, 239 La. 841, 120 So.2d 262 (La. 1960) at page 271:

> "It has frequently been observed by us that in the absence of fraud,corruption or proof that the irregularities complained of would have changed the result of the election, the election will not be set aside solely because of the failure of some ministerial officer to perform every formal direction prescribed by law. Duncan v. Vernon Parish School Board, 226 La. 379, 7 So.2d 403 (and cases cited therein)."

This principle is still being followed by our courts, and is still applicable law under the new election code.

To overcome this principle of law, plaintiff must show that what happened here created a situation that, in effect, was a denial of the right to vote sufficient to change the result of the election as contemplated in the new election code. As we analyze the facts, the householder at the old polling place on LaHarpe Street put a sign on the premises notifying that there was no voting there that day and that approximately 6:15 A.M. (the polls opened at 6:00 A.M.) added to the sign "New location 1932 Touro St. Rivers Friderichs School". He also testified that later on there were persons directing the voters to the new location. Mr. Charbonnet himself visited the polls shortly after 9 o'clock and requested some of his workers to man the area to notify prospective voters and to furnish transportation to the new polling place.

The main evidence relied upon by plaintiff to show loss of the right to vote were the depositions of 16 people who were registered in the precinct and testified generally that they would have voted at the old location. One of these actually voted, 3 did not go to the old location at all, but heard that it was closed and so did not attempt to vote, 7 knew of the change in location but found it inconvenient to vote there and 5 testified that they went to the old location but were not aware of the change to the new location and so could not vote. It was stipulated that some 8 other witnesses would testify generally to the same effect as these witnesses.

We conclude that this is insufficient to meet the requirements stated in R.S. 18:1432 to declare this election void. With this conclusion, plaintiff is not entitled to the relief he sought, or to the relief afforded by the trial judge, whose judgment we reverse.

In connection with the issue of the 60 votes allegedly uncounted on the vote machines, we agree with the findings of the trial judge and his reasoning on that point, within the application of the law and reasons discussed above.

For the reasons assigned, the judgment appealed from is affirmed insofar as it overrules the exceptions of peremption and/or prescription. The judgment is reversed on the merits, dismissing plaintiff's suit at his costs.

AFFIRMED IN PART,
REVERSED IN PART.

LOUIS CHARBONNET, III NO 9522

VS.

HENRY E. BRADEN, IV

LEMMON, J., CONCURS AND ASSIGNS REASONS

The critical issue in this case is whether the court should afford plaintiff relief, irrespective of the Election Code, because the moving of the polling place so substantially deprived the voters of Precinct 6 of the right to vote that the result of the election may have been different if this right had been fairly accorded to these voters.[1]

Although the diligence of the governing authority left something to be desired in accomplishing the removal of the old polling place requested by the property owner, the record establishes the existence of an emergency shortly before the election. Thereafter, the situation was handled reasonably. A nearby location was secured by a City official who was unaware of the new law requiring the polling place to be located within the precinct. Notice of the change was published in the newspaper on the afternoon before and the morning of the election. A sign was placed at the old polling place, notifying voters of the move and of the location of the new poll-

1. It is relatively insignificant that the new polling place was established in another precinct in violation of the Election Code. The statute requiring the location of the polling place within the particular precinct is directory to the governing authority in the sense that the authority has no discretion. However, violation of this directory statute does not automatically void the election, in the absence of showing of fraud or other calculated or unreasonable detriment to the candidate contesting the violation.

ing place.

Equally important, there was absolutely no suggestion of fraud or purposeful confusion. Nor was there any suggestion of untimely changing of polling places as a way of life in local elections or of any other reason to doubt the motives of the governing authority.

The record justifies the conclusion that this was a fair election in which all voters were fairly accorded the right to vote.

GARSAUD, J., CONCURRING.

Although I am in full agreement with the majority opinion, I believe the question of waiver should be addressed.

Appellant argues that under R.S. 18:1434, plaintiff waived any objection to an irregularity. That section states:

> "An objection to the qualifications of a voter or to an irregularity in the conduct of the election which, with the exercise of due diligence, could have been raised by a challenge of the voter or objections at the polls to the procedure is deemed waived."

It is the appellant's view that with due diligence, plaintiff could have and should have discovered the change in the location of the polling place for Ward 7, Precinct 6 in the official notice of such change in the States-Item of Friday, March 31, 1978. Had he exercised diligence, the appellant argues, plaintiff would have been aware of the change and could have raised a timely objection as, for example, seeking judicial relief. By failing to do so, under circumstances where it is apparent the person objecting could have done so, an individual waives the objection.

I agree with the appellant that the principle of estoppel underlying R.S. 18:1434 applies, and conclude that plaintiff waived his objection. Plaintiff was in a position to challenge timely the irregularity and chose not to do so. To rule otherwise would be to condone a situation where a candidate fully apprised as a matter of law of an irregularity could sit back and wait until the election is over and then register an objection only with regard to those irregularities that the election results show adversely affected him. The election

process is for the benefit of the people and not for the exclusive benefit of the candidate. Justice and fairness require that a candidate object to an irregularity *qua* irregularity, and not after the fact, when it may be used exclusively to his own advantage. Of course, where there is no chance for the candidate to be aware of the irregularity until after the election, this analysis would not obtain. However, the facts in our case indicate an opportunity to object prior to the election.

BAILES, J., CONCURRING

I concur in the result of the majority that the judgment appealed must be reversed. There is no authority within the four corners of the Election Code for the court to order a revote in one precinct save the provision of Section 1433 in an instance of malfunction of a voting machine.

Although the plaintiff does contend there was voting machine malfunction, the proof is clear that the voting machine(s) did not malfunction. The evidence clearly preponderates that voter error accounts for the recording of a larger number of voters entering the machine than the combined total of votes cast.

There is no question whatever that the changing of the voting place for Precinct Six, Ward Seven, voters is an election irregularity, but this irregularity does not vitiate the election.

Under Part II of Chapter 9 of the Election Code, the Code details the only grounds for the Court to void an election. If the reasons or grounds advanced for voiding an election are not contained therein, the Court cannot void the election.

Section 1431 treats questions of fraudulent, illegal votes and uncounted votes. This has no application to this suit.

Section 1432 states:

> "The final judgment in an election contest shall declare the election void if: (1) it is impossible to determine the result of election, or (2) the number of qualified voters who were denied the right to

> vote by the election officials was sufficient to change the result in the election, if they had been allowed to vote, or (3) the number of unqualified voters who were allowed to vote by the election officials was sufficient to change the result of the election if they had not been allowed to vote, or (4) a combination of the factors referred to in (2) and (3) herein would have been sufficient to change the result had they not occurred."

The only possible cause that deserves discussion is,

> (2) the number of qualified voters who were denied the right to vote by the election officials was sufficient to change the result in the election, if they had been allowed to vote.

If the voting place change can be construed as a denial of the right to vote to these individuals who stated they went to the former voting place at 1406 1/2 LaHarpe Street, such denial was not by the election officials. The voting place change was made at the demand of the property owner of 1406 1/2 LaHarpe Street by an administrative assistant of the mayor of the City of New Orleans. This administrative assistant is not an election official.

Additionally, I find that the plaintiff candidate waived any objection he had to the irregularity complained of by not protesting or seeking to enjoin the voting place location change. The notice of the change was advertised in time for protest prior to the election.

For these reasons, I find the judgment appealed must be reversed and, accordingly, I concur in the result of the majority.

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

LOUIS CHARBONNET, III April 17, 1978

V.

HENRY E. BRADEN, IV NO. 62,029

In re: Louis Charbonnet, III, applying for certiorari, or writ of review, to the Court of Appeal, Fourth Circuit, Parish of Orleans.

Writ denied.

/s/ JWS
/s/ FWS
/s/ AT JR
/s/JAD
/s/ PFC
/s/ WFM
/s/ JLD

A TRUE COPY
Clerk's Office
Supreme Court of La.
New Orleans
April 17, 1978

s/ Frank J. LeBranch, Jr.
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LOUIS CHARBONNET, III, ET AL CIVIL ACTION

VERSUS NO. 78-1238

HENRY E. BRADEN, IV, ET AL SECTION: F

ORDER AND REASONS FOR JUDGMENT

This matter came on for hearing on Monday, April 17, 1978. To the extent that any of the following findings of fact constitute conclusions of law, they are adopted as such, and to the extent that the conclusions of law constitute findings of fact, they are adopted as such.

This election contest centers around the relocation of the polling place for Precinct 6, Ward 7 of the City of New Orleans, prior to the April 1, 1978 run-off election for the 4th Senatorial District. All parties agree that the polling place was moved by city officials to a place located outside of Precinct 6, approximately 10-12 blocks from the old location. Since October 11, 1977, the man charged with the responsibility of selecting the polling places for city elections was James Pfister. It was Mr. Pfister who chose the alternate location for the polling place at issue herein. Counsel for all parties have stipulated that, if so asked, Mr. Pfister would testify that there was no racial prejudice or discrimination based upon race which motivated his decision to relocate the polling place for Ward 7, Precinct 6 to a spot outside of the precinct, and that he did not conspire with anyone to locate or relocate polling places so as to deprive any

person of the right to vote.

This suit was originally brought solely under the provisions of 42 United States Code, § 1973c. Section 5 of the Voting Rights Act of 1965, provides that:

> Whenever a State or political subdivision... shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice or procedure if the State or subdivision has not first obtained a declaratory judgment in the United States District Court for the District of Columbia that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or [unless the chief legal officer or other appropriate State or subdivision official has submitted the qualification, prerequisite, standard, practice or procedure to the Attorney General of the United States] and the Attorney General has not interposed an objection within sixty days of such submission . . .[The Act further provides that] any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of Title 28 and any appeal shall lie to the Supreme Court.

Plaintiffs allege, in essence, that the location of polling places constitutes a "standard, practice, or procedure with respect to voting" which requires prior federal approval to have legal effect. Since city officials did not obtain the requisite statutory approval with regard to the instant polling place change plaintiffs argue that the April 1st Senatorial election should be declared null and void.

On Monday, April 17, 1978, at 11:03 AM, this Court granted a Temporary Restraining Order enjoining defendants from "taking any steps whatsoever to invest the defendant, Henry E. Braden, IV" with the office of Senator from the 4th Senatorial District for the State of Louisiana, "until further orders of this Court." The injunctive order was issued by this Court to afford an opportunity for the Court to study the law and to make a proper disposition of this case. After conducting a hearing in this matter, the Court is now prepared to enter an appropriate order.

There seems to be little doubt that the location of polling places constitutes a "standard, practice, or procedure with respect to voting" as contemplated by 42 United States Code § 1973c. In *Perkins v. Matthews*, 400 U.S. 379, 387-388, 91 S.Ct. 431, 436-437 (1971), the Court said:

> Even without going beyond the plain words of the statute, we think it clear that the location of polling places constitutes a "standard, practice, or procedure with respect to voting". The abstract right to vote means little unless the right becomes a reality at the polling place on election day. The accessibility, prominence, facilities, and prior notice of the polling places' location all have an effect on a person's ability to exercise his fran-

> chise. Given § 5's explicit concern with both the purpose and the effect of a voting "standard, practice, or procedure" the location of polling places comes within the section's coverage. Moreover, the legislative history provides ample support for the conclusion that Congress intended § 5 to cover a change in polling places. Before the Senate Judiciary Committee, the Attorney General explicitly testified that a change in "the place of registration" and a change "from a paper ballot to a machine" were changes of the kind that § 5 was designed to reach. Plainly, the relocation of the polling places is precisely the same kind of change. Moreover, there inheres in the determination of the location of polling places an obvious potential for "denying or abridging the right to vote on account of race or color" . . . Consequently, we think it clear that § 5 requires prior submission of any changes in the location of polling places.

However, it is equally free from doubt that the clear language of § 1973c precludes this single judge court from making such an inquiry. Section 1973c of Title 42, United States Code, provides that:

> Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

In *Sumter County Democratic Executive Committee v. W.E. Dearman*, 514 F.2d 1168, 1170 (CA 5-1975), Chief

Judge John R. Brown, speaking for the United States Court of Appeals for the Fifth Circuit, stated:

> . . . The initial determination whether a change in voting procedures has been effected and so is covered by the Act must be heard by a three-Judge Court of the District in which the suit is brought . . In denying appellants the relief they sought the District Judge impliedly found that there had been no change in a voting practice or procedure. *This he could not do.* The teaching of *Allen, supra,* is clear. Congress has mandated "the disputes involving the coverage of § 5 be determined by a district court of three judges." 393 U.S. at 563, 89 S.Ct. at 830, 22 L.Ed.2d at 16. It is true that the change, if any, represented by a shift from certification by the Committee Chairman to certification by the Committee Secretary is small indeed. But in *Allen* the Supreme Court expressly rejected the argument that § 5 had no application to the qualification of candidates, 393 U.S. at 563-570, 89 S.Ct. at 830-834, 22 L.Ed.2d at 16-20, and required that "all changes, no matter how small, be subjected to § 5 scrutiny." Id. at 568, 89 S.Ct. at 833, 22 L.Ed. 2d at 16.
>
> In reciting this standard we, of course, intend no intimation either way as to whether the disputed practice here constitutes a change covered by the Act . . . We do not find it necessary to void the election following the lead of the Supreme Court in *Perkins v. Matthews... the question of the appropriate remedy should be left initially to the*

three-Judge Court. (underscoring ours.)

Therefore, our only task at this point is to decide whether or not to continue this Court's Temporary Restraining Order of April 17, 1978, until the case can be considered by a three-judge court.[1]

The purpose of issuing a Temporary Restraining Order is to prevent irreparable harm so as to preserve the Court's ability to render a meaningful decision on the merits.[2] The Fifth Circuit has delineated four prerequisites for the award of injunctive relief: (1) a substantial likelihood that plaintiff will prevail on the merits; (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to the defendant; and (4) that granting the prelimianry injunction will not disserve the public interest.[3] None of the four prerequisites for injunctive relief has a fixed quantitative value. Rather, a sliding scale is utilized, which takes into account the intensity of each in a given calculus.[4]

In the instant case, two factors stand paramount in this Court's consideration of the continuation of the injunction.

1. On Tuesday, April 18, 1978, this Court communicated a request to Chief Judge John R. Brown to appoint a three judge court to consider plaintiffs' claims under 42 U.S.C. § 1973c.

2. *Meis v. Sanitas Service Corp.*, 511 F.2d 655 (CA 5-1975).

3. *Morgan v. Fletcher*, 518 F.2d 236 (CA 5-1975); *Blackshear Residents Organization v. Romney*, 472 F.2d 1197 (CA 5-1973).

4. *State of Texas v. Seatrain International, S.A.* 518 F.2d 175 (CA 5-1975).

In light of all the surrounding circumstances, these factors persuade us that the Temporary Restraining Order should be withdrawn. First, we are unconvinced that plaintiffs will suffer irreparable harm if the injunction is not continued. The plaintiffs' attempts to have the April 1st Senastorial election invalidated will not be affected if Mr. Braden, the apparent winner of the election, assumes his seat in the Louisiana Senate during the pendency of any legal proceedings before a three judge court. Second, we firmly believe that a continuation of the injunction will disserve the public interest. Pending the decision of the three judge court, the people of the 4th Senatorial District of the State of Louisiana should not be without representation in the State Senate during the current session of the Legislature, which convened on April 17, 1978. (The Attorney General of the State of Louisiana has now ruled that the 4th District Senatorial position is vacant.) The injunction, therefore, must be withdrawn. [5]

The plaintiffs have amended their complaint in an attempt to add another basis of jurisdiction over this matter, i.e., 42 United States Code § 1983. In *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362 (1964), the United States Supreme Court recognized that the Constitution, particularly the Fourteenth Amendment, protects the rights of all qualified citizens to vote in federal and state elections. It is not every election ir-

5. Injunctive relief is an extraordinary and drastic remedy which should not be granted unless the movants clearly carry the burden of persuasion. *Canal Authority of the State of Florida v. Calloway*, 489 F.2d 567 (CA 5-1974).

regularity, however, which will give rise to a constitutional claim and an action under § 1983.[6] Indeed, that statute requires willful conduct which undermines the organic processes by which candidates are elected – not merely irregularities caused by human error lacking in invidious or fraudulent intent.[7]

As stated in *Hennings v. Grafton*, 523 F.2d 861, 865 (CA 7-1975):

> Except for the overall supervision of the county clerk, or his counterpart, and appointed subordinates, the work of conducting elections in our society is typically carried on by volunteers and recruits for whom it is at most an avocation and whose experience and intelligence vary widely. Given these conditions, errors and irregularities, including the kind of conduct proved here, are inevitable and no constitutional guarantee exists to remedy them. *Pettengill v. Putnam County R-1 School Dist.*, 472 F.2d 121 (8th Cir. 1973); *Powell v. Power*, 436 F.2d 84 (2nd Cir. 1970); see also *Means v. Wilson*, 383 F.Supp. 378 (D. S.D. 1974). Rather, state election laws must be relied upon to provide the proper remedy.

We are in complete accord with the following excerpt taken from the opinion of the Court in *Donohue v. Board of Elections of the State of New York*, 435 F.S. 957, 966 (E.

6. *Hennings v. Grafton*, 523 F.2d 861, 864 (CA 7-1975); *Powell v. Power*, 436 F.2d 84 (CA 2-1970).

7. *Smith v. Cherry*, 489 F.2d 1098 (CA 7-1973); *cert. denied*, 417 U.S. 910, 94 S.Ct. 2607 (1974); *Hennings, supra.*

D. N.Y. 1976):

> Purposeful deprivation of the right to vote will not be assumed merely because there is evidence that election officials acted incompetently or negligently . . . Rather, intentional acts must be proven, "the quantum of proof necessary being a matter of federal law." (Citations omitted) . . . the party seeking a new election must establish that the fraud or other unlawful behavior changed the outcome of the election. In the absence of proof of a causal relationship between the unlawful conduct and the result of the election, injunctive relief must be denied. (Citations omitted.)

Thus, before a federal court can responsibly order a new election or grant injunctive relief under 42 United States Code § 1983, the claimants seeking this extraordinary relief must come forward with the most clear and convincing evidence that state officials or persons acting under color of state law, by intentionally depriving qualified voters of the right to vote, altered the outcome of the election.[8] No such evidence has been produced in instant case.

In essence, complainants ask this federal court to oversee the administrative details of a local Senatorial election. Under similar circumstances, the United States Court of Appeals for the Eighth Circuit made the following observation, which is particularly relevant to instant plaintiffs' claim under § 1983:

8. *Donohue v. Board of Elections of the State of New York, supra,* at page 968.

> We find no constitutional basis for [overseeing the administrative details of a local election] in the absence of aggravating factors such as denying the right of citizens to vote for reasons of race, see *United States v. Raines*, 362 U.S. 17, 80 S.Ct. 519 (1960), or fraudulent interference with a free election by stuffing of the ballot box, see *United States v. Saylor*, 322 U.S. 385, 64 S.Ct. 1101 (1944), or other unlawful conduct which interferes with the individual's right to vote, see 42 U.S.C. § 1985.[9]

For the foregoing reasons,

IT IS ORDERED, ADJUDGED AND DECREED that the Temporary Restraining Order issued by this Court on April 17, 1978, be and the same is hereby, ANNULLED, VACATED AND SET ASIDE as of 12:00 Noon, Thursday, April 20, 1978, in order to allow plaintiffs sufficient time to apply for appropriate relief;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiffs' motion for injunctive and/or declaratory relief under 42 United States Code § 1983 be, and the same is hereby, DENIED. [10]

New Orleans, Louisiana, this 19th day of April, 1978.

s/ Lansing L. Mitchell
UNITED STATES DISTRICT
JUDGE

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9. *Pettengill v. Putnam County R-1 School District, Unionville, Missouri*, 472 F.2d 121, 122 (CA 8-1973).

10. It was understood between the Court and all counsel that the April 17, 1978 hearing would apply to all aspects of plaintiffs' case.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

LOUIS CHARBONNET, III, ET AL. — CIVIL ACTION

VERSUS — NUMBER: 78-1238

HENRY E. BRADEN, IV., ET AL — SECTION "F"

ORDER

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiffs' petition for an injunction pending appeal be and it is hereby granted, and that the defendants herein, their respective officers, agents, servants, representatives, employees, attorneys and successors, and all other persons in active concert with them or participation with them, be and they are hereby enjoined from directly or indirectly proceeding to give effect to the returns of the election held on April 1, 1978 in the Fourth Senatorial District for the State of Louisiana by taking any steps whatsoever to invest the defendant, Henry E. Braden, IV with that office, or in any other way to give any effect to the results of said election until further orders of the court and until otherwise ordered by this court or by the Fifth Circuit Court of Appeals.

NEW ORLEANS, LOUISIANA, this 20th day of April, 1978.

s/ Lansing L. Mitchell
UNITED STATES DISTRICT
JUDGE

DENIED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED: Dec. 8, 1978

LOUIS CHARBONNET, III, et al — CIVIL ACTION

VERSUS — NO. 78-1238

HENRY E. BRADEN,IV, et al — SECTION : F

REASONS FOR JUDGMENT

This matter is before this three-judge Court on cross motions for summary judgment. In order that the issues be understood it is necessary to review the history of this short-lived, but well litigated, controversy.

This controversy arises out of the April 1, 1978, general election held in New Orleans in which the legislative seat for the Fourth Senatorial District of Louisiana was at stake. The legal issues herein center on the alleged discriminatory effect of the relocation of the polling place for Ward 7 Precinct 6 to the Rivers Frederick School located outside the boundaries of Precinct 6.

The facts of the case are largely undisputed. At the time in question, James Pfister was an administrative assistant to the Mayor of the City of New Orleans and was responsible for the relocation of polling places for the April 1, 1978 election. Pfister testified, both in the state court proceeding and at the preliminary hearing before the United States District Judge, that at some time between March 7 and March 13, 1978, he was contacted by Joseph Desvignes, who resides at

1406 1/2 LaHarpe Street, New Orleans, Louisiana, which address had, since 1969, been the site of the polling place for Precinct 6, Ward 7. Desvignes informed Pfister that he no longer desired to have his home used as a polling place. Pfister then contacted Robert Markham, an Orleans Parish School Board Supervisor, about the possibility of using Mc Donough No. 35 school, located around the corner from the Desvignes house, as a polling place. Markham checked with school officials and ascertained that the school would not be available on April 1, 1978. Pfister requested Markham to make inquiries into procuring the use of a school in the area. Markham telephoned the next day, which was probably the 17th of March, and informed Pfister that the Rivers Frederick Junior High School, located at 1932 Touro Street, would be available for use as a polling place. Pfister was not aware of the specific location of the latter school, which was some ten to twelve blocks from the old polling place, and also did not know that it was outside the boundaries of Precinct 6. Pfister testified that he had no knowledge that the Louisiana Election Code required a polling place to be within the boundaries of its precinct.

On March 17, 1978 Pfister sent a letter to city and election officials notifying them of the change in the polling place for Ward 7 Precinct 6. The March 29, 1978 issue of the New Orleans Times-Picayune newspaper listed all polling places for the forthcoming election, and Pfister noted that it did not reflect the change in the location of the polling place for Precinct 6. This prompted Pfister to write a second letter to city and election officials on March 30, 1978, again pointing out the change in the polling place from LaHarpe Street to the Rivers Frederick School. On March 31, the eve of the elction, the New Orleans States-Item newspaper

listed the location of the polling place for Precinct 6 Ward 7 to be the "Pines" Frederick School at 1932 Touro Street. The Times-Picayune printed a news item on the morning of April 1, 1978 carrying the same description of the polling place.

On the evening prior to the election, Desvignes placed a sign on his house stating there would be no voting there on the next day and, at approximately 6:15 A.M. on election morning, he added the address of the new location. Charbonnet visited the Desvignes address at around 9:00 A.M.; discovered the change in location; and arranged for his campaign workers to furnish shuttle transportation to the new polling place from the old polling place and back. 243 votes were cast in Precinct 6 on April 1, 1978. Defendant Braden was the winner of the contest by a vote of 7,592 to 7,578 or a margin of 14 votes.

Thereafter, Charbonnet filed suit in state court seeking to have the election set aside because the polling place in Ward 7 Precinct 6 had been moved to a location outside Precinct 6, allegedly in contravention of the Louisiana State Election Code, LSA-R.S. 18:1 *et seq*. In addition, the tabulations on thirty-four (34) voting machines showed a total of sixty (60) fewer votes than the total amount of people voting. The state trial court rejected the plaintiff's second contention, finding that the difference in the count of votes was not due to malfunctioning of the voting machines, but was caused by the voters' errors in casting their ballots; that, since the amount of such votes was minimal, there was no reason to believe that re-voting in a new election would cause a different result. However, the trial judge was of the opinion that a new election should be called in Precinct 6 of Ward 7 be-

cause the polling place was illegally located outside the precinct.

In due course the matter was appealed to the Louisiana Fourth Circuit Court of Appeals.[1] At the outset the appellate court noted that the relief afforded Charbonnet by the trial judge, i.e., a new election in Precinct 6 of Ward 7, was not a remedy authorized by the Louisiana State Election Code, particularly LSA-R.S. 18:1431 *et seq*. The Court determined that the issues presented by this controversy came under Section 1432, which provides only for a declaration that the entire election be voided, and then only if it is impossible to determine the result of the election, or that the number of qualified voters who were denied the right to vote by election officials was sufficient to change the result of the election. The Court concluded that Charbonnet failed to carry his burden on either point.

In discussing the testimony of the sixteen (16) registered voters, presented in deposition form, the Court found that one had actually voted; three did not go to the old polling place because they had heard that it was closed and, therefore, they did not vote; seven knew of the change in location but found it inconvenient to vote there; and five testified that they went to the old location but were not aware of the change and so could not vote. Although the parties had stipulated that eight (8) other witnesses would testify generally to the same effect, the Court held that this evidence was insufficient to meet the burden imposed by Section 1432. Charbonnet petitioned the Supreme Court of Louisiana for writs of certiorari and review and writs were

1. *Charbonnet v. Braden*, 358 So.2d 360 (La. App. 4-1978).

denied.[2]

Following the denial of relief by the Supreme Court of Louisiana, Charbonnet and eleven voters from Ward 7 Precinct 6 filed this class action suit, seeking a declaratory judgment and injunctive relief against enforcement of the change in the polling place in violation of the provisions of Title 42, United States Code, Section 1973(c). On April 17, 1978 a temporary restraining order was issued prohibiting state officials from taking any steps to invest defendant Braden with the office of state senator. A hearing was held that same day and, thereafter, petitioners filed an amended complaint seeking additional relief under Title 42, United States Code, Section 1983.

Two days later, on April 19, 1978, the district court issued an order vacating and setting aside the temporary restraining order and denying plaintiffs' motion for injunctive and/or declaratory relief under Title 42, United Stated Code, Section 1983. The district court properly concluded that any action for relief under Title 42, United States Code, Section 1973(c) could be considered only by a three-judge court and that continuation of the temporary restraining order pending the convening of such a court would not serve the public interest. The Court further reasoned that dissolution of the order would not cause irreparable harm to petitioners. Thereafter defendant Braden was invested with the office of state senator for the Fourth District.

After the impaneling of the three-judge court, as required by Title 42, United States Code, Section 1973(c), petitioners again amended their complaint to allege a cause of action

2. Unreported decree.

under Title 42, United States Code, Section 1971. Plaintiffs and defendant Braden have each filed motions for summary judgment on both the 1973(c) and the 1971 actions

Also before this Court is plaintiff's motion to maintain the class action. Because of this Court's disposition of the motions for summary judgment, we do not reach plaintiff's motion to maintain this action as a class action, and thus it is moot.

Along with plaintiffs' motions for summary judgment there was submitted an extensive list of uncontested material facts which were objected to by the defendant on only minor points. Also submitted was the entire record of the state court proceedings, along with the depositions of twenty people, most of whom were voters in the 6th Precinct. It is apparent to this Court that there is no dispute as to any material fact, and that the case is ripe for disposition on summary judgment.

Title 42, United States Code, Section 1971(a)(1) provides:

> All citzens of the United States who are otherwise qualified by law to vote at any election by the people in any state . . .parish . . . or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color or previous conditions of servitude, any constitution, law, custom, usage, or regulation of any staste or Territory, or by or under its authority to the contrary notwithstanding.

In determining whether or not there has been a violation

of Title 42, United States Code, Section 1971, we have considered the legislative history and purpose for the passsage thereof.[3]

Section 1971 is derived from the Civil Rights Act of 1870,[4] which, as amended, was passed to fulfill the Federal Government's responsibilities under the Fifteenth Amendment. [5]

Section 1 of the Fifteenth Amendment provides that

> the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude.

Section 2 thereof provides Congress with the authority to enforce the article by appropriate legislation. The amendment invalidates state voting qualifications or procedures which are discriminatory on their face or in practice.[6]

In 1957, Congress found it necessary to amend the Civil Rights Act and Section 1971 to eliminate the discriminatory practices which had been employed over the years by State officials to deprive blacks of their right to vote and to thwart

3. 1957 U.S. Code Cong. and Adm. News p. 1966; 1960 U.S. Code Cong. and Adm. News, 1925; 1964 U.S. Code Cong. and Adm. News, p. 2355; 1965 U.S. Code Cong. and Adm. News, p. 2437.

4. *Nevett v. Sides,* 571 F.2d 209 (CA 5-1978).

5. *South Carolina v. Katzenbach,* 86 S.Ct. 803, 383 U.S.301 (1966); *Beer v. United States,* 374 F.Supp. 363, remanded on other grounds, 96 S.Ct. 1357, 425 U.S. 130 (1976).

6. *Toney v. White,* 348 F.Supp. 188, 476 F.2d 203, affirmed in part and reversed in part. 488 F.2d 310 (CA 5-1973).

the purposes of the Fifteenth Amendment.[7] The purpose of those amendments and the subsequent Voting Rights Act of 1965 was to banish discriminatory devices and tactics such as racial gerrymandering, grandfather clauses, literacy tests and other tactics used to prevent blacks from registering to vote.[8] In all of these situations an obvious pattern or practice of racial discrimination emerged which was being used to deprive blacks of their right to vote because of their race.[9]

This election involved two black candidates. Evidence was presented to the effect that Charbonnet was the favorite of the black constituents of the district. However, the Court finds that such evidence merely reflects the political preference of Charbonnet's supporters rather than a racially motivated exercise of their franchise rights. We find that the relocation of a polling place to a new location some ten or twelve blocks away from the old polling place, to a neighborhood racially similar in character and in an emergency situation, was not discriminatory in practice or in effect in violation of Section 1971.

The parties stipulated that the movement of the polling place was not racially motivated. Pfister was unaware of the exact location of the new polling place or that its placement outside of the precinct was in violation of the new Louisiana

7. 1957 U.S. Code Cong.and Adm. News, p. 1966.

8. 1960 U.S. Code Cong. and Adm. News, p. 11, 1925; 1965 U.S. Cong. and Adm. News, p. 2437.

9; *Guinn v. U.S.,* 35 S.Ct. 926, 238 U.S. 347, 1915 (grandfather clause); *Gomillion v. Lightfoot,* 81 S.Ct. 125, 364 U.S. 339 (1960 (racial gerrymandering); *Louisiana v. United States,* 85 S.Ct. 817, 380 U.S. 145 (1965); *Schnell v. Davis, 69 S.Ct. 744, 336 U.S. 933 (1969), (literacy tests).*

election code. The evidence showed that Pfister made every effort to have the new address of the polling place properly published in the New Orleans newspapers. However, as is common in almost all elections, a technical irregularity, caused in part by the negligence of the City, arose and jeopardized the validity of the election.

This Court does not believe that, in passing Title 42, United States Code, Section 1971, Congress intended that the finality of elections should be put in jeopardy by every technical irregularity which occurs during the voting procedure. Such irregularities are inevitable, especially in a city-wide voting situation, and should not be the basis for voiding an election in the absence of evidence of racial discrimination. We find no such evidence in this record.

For the foregoing reasons, the Court finds that the relocation of the polling place for Ward 7 Precinct 6 was not a discriminatory practice nor did it have the discriminatory effect of depriving black persons of their right to vote on April 1, 1978 on the basis of their race, in violation of Title 42, United States Code, Section 1971.

Title 42, United States Code, Section 1973(c) provides, in pertinent part, as follows:

> Whenever a State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such

> qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, . . . and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made . . . Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Petitioners contend that the removal of the polling place from Ward 7 Precinct 6 to a location outside the precinct constituted a change in a "standard, practice, or procedure with respect to voting" required to be approved by the United States Attorney General under the provisions of 1973(c) and that they were denied their right to vote for their failure to comply with the change, in violation of the express provision of 1973(c).

Petitioners further contend that, although there was no discriminatory motive behind the last minute change, the change was discrimiatory in effect and affected the outcome of the election. Accordingly, petitioners argue that the April 1, 1978 election should be declared null and void and a new election ordered.

Defendants contend that the emergency moving procedures provided for in the Louisiana Election Code, LSA-R.S. 18:534-535, had previously been approved by the Attorney General and thus there was no need to submit the instant change for approval. Alternatively, defendants contend that the change was submitted via letter to the Attorney General dated March 21, 1978, which constituted submission with the requirements of Section 1973(c).

There can be no doubt that the changing of a polling place falls within the purview of Section 42, United States Code, Section 1973(c). The Supreme Court of the United States, in *Perkins v. Matthews*,[10] stated:

> Even without going beyond the plain words of the statute, we think it clear that the location of polling places constitutes a standard, practice, or procedure with respect to voting.

Thus there are three issues for resolution by this Court: (1) Did the prior submission of the entire Louisiana Election Code and the Attorney General's entry of no objection thereto alleviate the necessity of submitting the instant change complained of; if not, (2) was the submission of the change via letter of March 21, 1978 sufficient compliance

10. 400 U.S. 379, 91 S.Ct. 431, 436 (1971).

with the provisions of Section 1973(c); and,if not, (3) what remedy should be afforded petitioners.

The first question must be answered in the negative. The submission of the entire Election Code to the Attorney General did not alleviate the necessity of submitting the instant change in the polling place because the change itself did not comply with the previously approved Election Code. LSA-R.S. 18:533B provides that "the polling place for a precinct shall be located in the precinct." It is undisputed that the new polling place was located outside Precinct 6, in Precinct 7, a non-contiguous precinct. Such a change would require approval by the Attorney General under Section 1973(c).

Defendants contend that the letter of March 21, 1978 from Ernest T. Salatich, Assistant City Attorney for New Orleans, to Assistant Attorney General, J. Stanley Pottinger, constituted sufficient compliance with the requirements of Section 1973(c). Petitioners argue that the letter was insufficient because it was not postmarked until March 30, 1978, and not received until April 3, 1978, after the April 1, 1978 election was held. Petitioners contend that such a submission must be made at least 60 days in advance of an election in which the change is to be enforced.

It is implicit in Section 1973(c) that the submission of the change should either be made in excess of 60 days before the election in which the change is sought to be enforced or, if the submission is made at a later date, it should be accompanied by a request for an expedited consideration.[11]

We conclude that the City of New Orleans filed to comply

11. See 28 C.F.R. 51.22.

with the provisions of Section 1973(c). The submission, although dated March 21, 1978, was not postmarked until March 30, 1978, two days before the election, and was not received until two days after the election. The reason for this late submission is not apparent from the evidence before this Court. However, it is specifically noted that petitioners do not allege that the actions of the City were willful or purposeful. To hold that the instant submission was sufficient to comply with the requirements of Section 1973(c) would be to circumvent the purpose behind the provision.

The most difficult question to resolve is: what relief should be afforded petitioners as a result of the City's technical violation of Section 1973(c). Although the Supreme Court of the United States, in *Perkins, supra,* held that a district court, in deciding coverage questions, should not consider or determine whether a covered change does or does not have the purpose or effect "of denying or abridging the right to vote on account of race or color," it also stated that the district court should not "close its eyes" to the congressional purpose of enacting Section 1973(c).

Title 42, United States Code, Section 1973(c) was enacted as part of the Voting Rights Act of 1965, Section 1973(c) being Section 5 of that Act. The Supreme Court in *South Carolina v. Katzenbach,* [12] considered the extensive hearings and debates on the Act and concluded that the Act was designed to banish the blight of racial discrimination in voting which had infected the electoral process in parts of this country, thus attempting to make the mandate of the Fifteenth Amendment a reality. There is no contention that the change in the polling place with which we are here concern-

12. *Supra,* note 5.

ed was racially motivated; to the contrary, the parties have stipulated such was not the case.

Instead, petitioners contend that the change in the polling place was discriminatory in effect, arguing (and defendants do not refute the fact) that Charbonnet, a black man, was the choice of the majority of the black community, while Braden, also a black man, was preferred by a majority of the white population. Since Ward 7 Precinct 6 was over ninety per cent black, it follows, petitioners argue, that Charbonnet, the political preference of the black community, was denied the office he sought because of the change in the voting standard, practice, or procedure in Ward 7 Precinct 6, which happened to be predominantly black. Therefore petitioners argue that the election, at least in Ward 7 Precinct 6, should be set aside and a new election held.

The relief sought by petitioners is drastic and can be staggering to a community's vital interest in stable elections and prompt determination of their validity. Therefore a federal court should exercise guardedly the power to overturn a state election.[13] Elections will never be completely free of error as long as the human element is present and "not every unconstitutional racial discrimination necessarily permits or requires a retrospective voiding of the election."[14] The United States Court of Appeals for the Fifth Circuit, in an *en banc* decision, *Toney v. White,* [15] reversing in part the decision of the panel,[16] delineated three groupings of state election cases attended by demonstrable racial discrimination. In *James v. Humphreys County Board of Election*

13. *Bell v. Southwell,* 376 F.2d 659 (CA 5-1967).

14. *Bell* at 662.

15. 488 F.2d 310 (CA 5-1973).

16. 476 F.2d 203 (CA 5-1973).

Commissioners,[17] the Court succinctly summarized the groupings delineated in *Toney*-

> The first class of cases relate (sic) to instances where pre-election relief against discriminatory practices was sought and improperly denied; the mere passage of time did not preclude post-election relief, and new electioins were ordered. The second class of cases concern (sic) practices of racial discrimination where pre-election judicial relief, though readily available, was not timely sought, and post election relief was denied because of lack of diligence of the aggrieved plaintiffs. The third class of cases deal (sic) with racially discriminatory practices for which effective pre-election judicial relief was non-existent, as where the grievous conduct occurred on the very day of election or so close thereto as to make it impossible, or virtually impossible, to seek judicial remedy in advance of the election. As for the cases coming within the third category, we understand that the elections may be set aside only upon a finding that 'the racial discrimination was gross, spectacular and wholly indefensible,' or the evidence established 'racial discrimination which must have affected the election results.' (Footnotes deleted).

The first category discussed in *Toney* is not applicable here, as the facts show that no pre-election relief was sought by petitioners. The second category may also be dismissed for it is undisputed that the first public notice of the change

17. 384 F.S. 114 (D.C. Miss. 1974).

of the polling place was published in the evening edition of the New Orleans States-Item on March 31, 1978, the evening before the election. With such short notice it would have been near impossible for the petitioners to secure counsel and for counsel to prepare the necessary papers and secure the necessary facts to support a request for injunctive relief,[18] for the election was to be held the next morning.

This case falls squarely within the third category discussed in *Toney*, i.e., where effective pre-election relief was non-existent. As therein stated, the election can only be set aside upon a finding that the racial discrimination was gross, spectacular, or wholly indefensible or that the evidence established racial discrimination which might have affected the election results. The facts herein certainly do not warrant a finding of gross, spectacular or wholly indefensible discrimination.

Other equitable factors should also be considered in fashioning a remedy. First, the community has a substantial interest in stable elections. Inevitably, every election is going to have some irregularities and courts should be very careful in affording relief as drastic as ordering a new election. Section 5 of the Voting Rights Act has been given such an all encompassing interpretation,[19] that almost any election, when examined closely enough, could be found to be in technical violation of its requirements. To hold that every technical violation justified the calling of a new election would allow every losing candidate a second bite at the

18. *Toney v. White, supra,* n. 10.

19. *See Allen v. State Board of Education,* 393 U.S. 544, 89 S.Ct. 817 (1969); *Perkins, supra,* n. 5.

apple. This was surely not intended by the authors of Section 5.

Another factor that should be considered is the effectiveness of prospective relief. This case does not involve violations of Section 5 which have a pattern of frequent recurrence that indicate that the City of New Orleans is guilty of a blatant disregard of the requirements of Section 5 or indicate a planned pattern of invidious discrimination. This violation has all the earmarks of an isolated and inadvertant violation which might have been able to be avoided had election officials exercised a little more diligence.

Considering the law and all the above enumerated factors, this Court is of the opinion that the technical violation of Section 5 of the Voting Rights Act as found herein does not warrant this Court granting to petitioners the drastic relief which they seek. Although prospective relief may have been proper in this case, it appears to this Court that the question of this type of relief is moot in view of the fact that the polling place has now been returned within the bounds of Precinct 6 in compliance with the Louisiana Election Code.

Accordingly, we grant defendant Braden's motion for summary judgment under both Title 42, United States Code, Section 1971 and Title 42, United States Code, Section 1973(c).

New Orleans, Louisiana, this 7th day of December, 1978.

s/ Robert A. Ainsworth
UNITED STATES CIRCUIT JUDGE

s/ Lansing L. Mitchell
UNITED STATES DISTRICT JUDGE

s/ Jack M. Gordon
UNITED STATES DISTRICT JUDGE